



DATE: SEP 8 1994

CASE NO.: 94-JSA-2

IN THE MATTER OF:

MARTIN MORALES,
Complainant,

v.

PATRICK TAKASUGI,
Respondent.

Appearances:

Martin Morales, Pro Se

Patrick Takasugi, Pro Se

Jane Newby, Idaho Department of Employment

Annaliese Impink, United States Department of Labor

BEFORE: John M. Vittone
Deputy Chief Judge

DECISION AND ORDER

This matter arises under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1188, and the regulations promulgated thereunder at 20 C.F.R. Parts 655 and 658.

Procedural History

Complainant, Martin Morales, filed a complaint against Patrick Takasugi on March 30, 1993. The complaint alleged that Patrick Takasugi denied Mr. Morales, a qualified U.S. worker, employment as an irrigator on his farm. On March 31, 1993, the Complaint Determination found that Mr. Takasugi violated 20 C.F.R. §§ 655.102(b) (6) and 655.103(c).

A hearing in this matter was conducted before a state hearing officer on May 12, 1993. The state hearing officer issued a decision on September 1, 1993 and ruled that Patrick Takasugi violated 20 C.F.R. §§ 655.102(b) (6) and 655.103(c). Based on these findings, the state hearing officer ordered Mr. Takasugi to pay Mr. Morales \$237.12 and provide "written assurances that

all qualified U.S. workers referred to him under the H-2A program will be accepted for employment in the future; to provide written assurances that the [C]omplainant will not be blacklisted or otherwise retaliated against; and to provide written assurances that specifications on future orders will accurately represent the terms and conditions of employment and be in full compliance with all Job Service assurances." Mr. Takasugi timely appealed the state hearing officer's decision to the Regional Administrator ("RA") of the Employment and Training Administration, U.S. Department of Labor. In a decision issued on December 23, 1993, the RA affirmed the state hearing officer's decision. Mr. Takasugi appealed the RA's decision to this Office on January 24, 1994 and requested a formal hearing. On May 26, 1994, I ordered the parties to submit any legal arguments and documentation and notified the parties that a decision would be made whether to schedule a hearing or make a decision based on the existing record. See 20 C.F.R. § 658.424(b). The U.S. Department of Labor on June 22, 1994, and the Department of Employment for the State of Idaho on June 28, 1994, filed letters contending that no additional hearing is necessary and that the RA's decision should be affirmed. On June 24, 1994, Mr. Takasugi filed a letter requesting a federal hearing in this matter. Mr. Takasugi argues that the RA's decision should be reversed.

Factual Background

Respondent, Patrick Takasugi, owns Takasugi Seed Farms in Wilder, Idaho. State Hearing Transcript at 8, hereafter "Tr." Mr. Takasugi's farm is a member of the Snake River Farmers Association ("SRFA"), an association of agricultural employers. SRFA is authorized by its membership to act as their agent in the temporary alien agricultural labor certification process. Tr. at 50.

On March 9, 1992, Martin Morales, Complainant, was assigned to Mr. Takasugi for the position of irrigator. Exhibit 5, hereafter "Ex."¹ Mr. Morales reported to work on April 1, 1992. Upon arrival, Mr. Takasugi and Raul Luna, Takasugi Seed Farms's foreman, interviewed Mr. Morales. During the interview, Messrs. Takasugi and Luna explained that they used only siphon irrigation at Takasugi Seed Farms. Tr. at 14. Mr. Morales only had experience with sprinkler lines. Tr. at 28-29. The 1992 Job Order required 20 days experience as an irrigator and did not describe experience with any specific type of irrigation system.² Ex. 14. According to the Idaho

¹ All exhibit numbers refer to the State Administrative File referred to this Office on March 10, 1994.

² The Job Order's relevant specifications with respect to the type of experience necessary for an "irrigator" are as follows:

Tends sprinkler systems to irrigate land. along predetermined pattern in field.
Lays out lines of pipe Connects pipes using ball and socket connection or hook
and latch. Checks alignment of pipe and adjusts as necessary for proper water
distribution. Attaches line to water supply valve at designated point along
permanent water supply pipeline. . . .

Department of Employment, it has been past practice to assign workers according to the Job Order.³ Tr. at 48.

Mr. Morales claims that Mr. Takasugi rejected his application for employment when he learned that he had no experience as a siphon irrigator. Tr. at 29. Mr. Takasugi maintains that he offered the position to Mr. Morales three times (Tr. at 77), however, he also acknowledges that he informed Mr. Morales that he would be terminated upon employment because he had no past experience as a siphon irrigator. Tr. at 17.

Issues

The first issue in this case is whether the undersigned should hold an additional hearing in this matter. If a hearing is not necessary, the undersigned must resolve the issue of whether Patrick Takasugi violated 20 C.F.R. §§ 655.102(b)(6) and 655.103(c).

Legal Standard

In accordance with 20 C.F.R. § 658.425(b), the decision in this case is based on the entire Record submitted to this Office, including any legal briefs, the Record before the State agency, the investigation and the determination of the RA. Additionally, this decision is the final decision of the Secretary. See 20 C.F.R. § 658.425(c).

Discussion

With respect to the first issue in this case, 20 C.F.R. § 658.424(b) states that the administrative law judge "shall decide whether to schedule a hearing, or make a determination on the record."

At the State level, Mr. Takasugi was afforded all the components of a formal hearing. He was advised of his right to have counsel, which he apparently declined or could not retain. Mr. Takasugi had the opportunity to present witnesses and documentary evidence. Furthermore, Mr. Takasugi was afforded the opportunity to cross-examine the opposing witnesses. Mr. Morales and Mr. Even though Takasugi present contrary views as to what was said during the April 1,

³ Kay Cooke, Program Specialist for the Idaho Department of Employment, described the use and significance of the Job Order as follows:

The Job Order that is submitted by the [SRFA] for irrigators each year is submitted in February. There is quite a time period involved where it has to be submitted, passed on to the State Agency, the Department of Employment, where we recruit U.S. workers and that Job Order is actually written by the Farmers Association and then approved by the Regional Department of Labor and we basically go along with whatever the Job Order states. . . as far as what the job requirements are. That's what we use to determine who we are going to refer and who we are not going to refer on that Job Order. . . . (Emphasis supplied).

1992 interview, their positions are clearly defined in the Record, and nothing would be gained by the parties reiterating their respective positions.

Given that Mr. Takasugi was afforded a full and fair hearing at the State level, and that the parties' version of the events which took place on April 1, 1992 are clearly defined in the Record, there is no need for a formal hearing at this level. Accordingly, the remaining issue will be decided based on the Record forwarded to this Office.

According to 20 C.F.R. § 655.102(b)(6), the employer shall guarantee to offer the worker employment for at least three-fourths of the workdays of the total periods during which the work contract and all extensions are in effect. Furthermore, 20 C.F.R. § 655.103(c) provides that an employer may only reject or terminate a U.S. worker for a lawful or job related reason.

Based on the evidence presented at the hearing, Mr. Morales was a qualified worker for the position of irrigator. Mr. Morales had at least 20 days of irrigation experience as required by the Job Order. Tr. at 28; see also supra note 2. Additionally, Mr. Morales was interviewed and found able to fulfill the requirements of the Job Order. Tr. at 50.

Mr. Morales maintains that Mr. Takasugi rejected his referral as an irrigator. Tr. at 29. Mr. Takasugi argues, however, that Mr. Morales voluntarily turned down the job because he was not an experienced siphon irrigator. Tr. at 15. Mr. Takasugi admits that he informed Mr. Morales that he would be terminated upon employment because he did not have any experience as a siphon irrigator. Tr. at 17.

It is clear that there is no violation of the regulations when a qualified U.S. worker voluntarily rejects a position with the employer. There is, however, an obvious violation when an employer explicitly rejects a qualified U.S. worker without a lawful or job related reason. See 20 C.F.R. § 655.103(c). Thus, if Mr. Morales's version of the events of April 1, 1992 is true, there is a clear violation of the regulations because Mr. Morales fulfilled the requirements of the Job Order and SRFA determined that he was qualified.

The fact that Mr. Takasugi ultimately needed a siphon irrigator is immaterial in this particular case. Mr. Takasugi applied for an irrigator through his agent SRFA. The Job Order is clear -- applicants such as Mr. Morales need only 20 days of irrigation experience to qualify for the position set forth in the Job Order submitted by SRFA on behalf of Mr. Takasugi. Ex. 14. To now come forward and state that Mr. Morales is not qualified, as Mr. Takasugi has done in this case, essentially changes the rules midway through the game. Mr. Takasugi, after submitting the application and Job Order, asks for something that he had not applied for, namely, a siphon irrigator. A new application or, if possible, a modification of his original application should have been submitted.

The undersigned takes note of the January, 1993 Job Order for a Gravity Irrigator contained in the file.⁴ Ex. 15. One can only assume that this Job Order was created subsequent to the problems encountered by Mr. Takasugi, SRFA and Mr. Morales in this case. Tr. at 54. The undersigned, however, cannot reconsider this entire case based on this job description because this material was not relevant to Mr. Morales's application. Unfortunately, the inflexibility of the regulations, as well as the individuals who process these cases and represent the farmers, creates situations where a farmer such as Mr. Takasugi bears the costs incurred for submitting an application that does not reflect the true needs of the farmer.

In any event, the Record demonstrates that Mr. Takasugi's statement, to Mr. Morales, that he would be terminated upon employment due to his lack of siphon irrigation experience amounts to a de facto rejection. Tr. at 17. It is unreasonable and illogical for a prospective employee, such as Mr. Morales, to accept employment where the employer states that the employee would be terminated shortly after he was hired. Thus, Mr. Morales's contention that he did not voluntarily decline the position as irrigator at Takasugi Seed Farms on April 1, 1992 has merit.

Given the fact that Mr. Morales was qualified for the irrigator position described in the Job Order and that he did not voluntarily reject the position, I find that Mr. Takasugi violated the regulations by rejecting a qualified U.S. worker for other than a lawful job-related reason.

ORDER

Accordingly, it is hereby ORDERED that the Final Determination of the Regional Administrator sustaining the decision of the State Hearing Officer in this matter is AFFIRMED. It is ORDERED that Respondent; Patrick Takasugi, pay Complainant, Martin Morales, \$237.12 and provide written assurances that in the future he will accept all qualified U.S. workers referred to him under the H-2A program. Mr. Takasugi must also provide written assurances that he will not attempt to blacklist or retaliate against Mr. Morales.

JOHN M. VITTON
Deputy Chief Judge

JMV/dcm/eca

⁴ Relevant job specifications for a gravity, or siphon irrigator, are as follows:

Irrigates fields by gravity flow: Turns valve on head gate to release flow of water from underground water source into concrete irrigation ditch along edge of field. Observes water flowing into ditch and sets metal dams in ditch to regulate depth of water over (furrows) in fields. Places hands over end of siphon pipe, places pipe in water of filled ditch to create vacuum, and siphons water from ditch into corrugates. . . .